



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Kay O'Riordan
Craig for U.S. Senate
P.O. Box 2754
802 W. Bannock Suite LP 101
Boise, ID 83701

JUN 30 2009

RE: MUR 6128

Dear Kay O'Riordan:

On November 18, 2008, the Federal Election Commission notified Craig for U.S. Senate ("Committee") and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and the available information, the Commission, on May 19, 2009, found that there is reason to believe the Committee and you, as treasurer, violated 2 U.S.C. § 439a(b), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Shana M. Broussard, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,



Steven T. Walther
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Craig for U.S. Senate MUR 6128
and Kay O'Riordan, in her official
capacity as treasurer

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by James Lucas that alleges that former U.S. Senator from Idaho Larry E. Craig improperly used in excess of \$213,000 of campaign funds for personal use for legal and media relations fees stemming from an arrest that occurred June 11, 2007, at the Minneapolis International Airport. See 2 U.S.C. § 437g(a)(1). The Complaint further suggests that Craig reimburse the campaign funds or be subject to personal income tax. Based upon the Complaint and the available information, the Commission finds reason to believe that Craig for U.S. Senate and Kay O'Riordan, in her official capacity as treasurer, converted campaign funds to personal use in violation of 2 U.S.C. § 439a(b).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

1. Minnesota arrest, guilty plea and sentencing

During the pertinent time period, Craig was a sitting U.S. Senator from Idaho. On June 11, 2007, while at the Minneapolis International Airport awaiting a scheduled flight to Washington, D.C., Craig was arrested and charged with violating Minnesota criminal statute § 609.72 disturbing the peace-disorderly conduct and § 609.746 interference with privacy. According to public records, Craig entered a guilty plea to disorderly conduct on August 8, 2007. Pursuant to the plea agreement, Craig received a sentence of 10 days

1 jail time and a fine of \$1,000; the jail time and half of the fine were suspended
2 conditioned upon one year of unsupervised probation. Craig was not represented by
3 counsel during this process.

4 On August 27, 2007, the Washington, D.C. newspaper, *Roll Call* first reported the
5 details surrounding Craig's arrest and guilty plea. See John McArdle, *Craig Arrested,*
6 *Pleads Guilty Following Incident in Airport Restroom*, ROLL CALL, August 27, 2007,
7 available at <http://www.rollcall.com/news/breakingnews/19763-1.html>. That same day,
8 Craig issued a press release denying any inappropriate conduct and questioning the
9 correctness of his guilty plea without the advice of counsel. See News Release from U.S.
10 Senator Larry Craig: Statement of Senator Larry Craig, <http://craig.senate.gov/press/>,
11 August 27, 2007. National media highlighted the incident and Craig held a press
12 conference on September 1 announcing his intent to resign from the Senate effective
13 September 30, 2007. See News Release from U.S. Senator Larry Craig: Senator Craig
14 Announces Intent to Resign from the Senate, <http://craig.senate.gov/press/>, September 1,
15 2007 ("News Release, September 1, 2007"). Craig also reportedly announced that he had
16 retained the Washington, D.C. law firm Sutherland, Asbill & Brennan to serve as lead
17 counsel in his effort to overturn the conviction, and the Minnesota firm of Kelly &
18 Jacobson to serve as state counsel for this effort. Finally, Craig reportedly hired the crisis
19 management firm of Impact Strategies to handle all press inquiries regarding the arrest,
20 conviction, and the legal efforts to overturn his conviction. See *Craig Hires Attorneys,*
21 *Well-Known Crisis Manager*, IdahoStatesman.com, September 1, 2007, available at
22 <http://www.idahostatesman.com/larrycraig/v-print/story/147883.html>; see also News
23 Release, September 1, 2007. Within days of Craig's September 1 announcement, the

1 *Idaho Statesman* reported that Craig was reconsidering his decision to resign on
2 September 30, contingent upon his ability to overturn the state conviction. *See* Gregory
3 Hahn and Erika Bolstad, *Craig May Not Quit After All, if He's Cleared of Charges*,
4 *Spokesman Says*, IdahoStatesman.com, September 4, 2007, available at
5 <http://www.idahostatesman.com/1264/story/149810.html>.

6 Counsel filed a motion to overturn the guilty plea in Minnesota state district court,
7 which the court rejected on October 4, 2007. Craig issued another press release noting
8 disappointment with the state court's ruling and also providing that he would "continue
9 [his] effort to clear [his] name in the Senate Ethics Committee -- something that is not
10 possible if [he is] not serving in the Senate." *See* News Release from U.S. Senator Larry
11 Craig: *Craig Reaction to Court Ruling*, <http://craig.senate.gov/press/>, October 4, 2007.
12 Craig remained in office until the conclusion of his term and retired from the U.S. Senate
13 in January of 2009.

14 Craig appealed the district court's decision to the Minnesota Court of Appeal,
15 which rejected Craig's appeal on December 9, 2008. On January 9, 2009, Minnesota
16 counsel reportedly announced that Craig would not appeal to the state Supreme Court and
17 would cease all further efforts to withdraw his guilty plea. *See* Ben Pershing, *Ex-Senator*
18 *Craig Abandons Efforts to Withdraw Guilty Plea*, WASH. POST, January 9, 2009, at A02,
19 available at [www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/08/AR2009010803482_pf)
20 [dyn/content/article/2009/01/08/AR2009010803482_pf](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/08/AR2009010803482_pf).

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2. U.S. Senate Select Committee on Ethics

As Craig's conduct became a focus of the national media, the Republican Senate leadership reportedly requested that the U.S. Senate Select Committee on Ethics ("SCE") initiate an investigation. See Betsy Z. Russell, ETHICS PANEL REBUFFS CRAIG, (2008) <http://www.spokesmanreview.com/sections/larrycraig/?ID=208328> ("Russell, ETHICS PANEL REBUFFS CRAIG"). Craig announced that he had retained counsel, Stan Brand, of the Brand Law Group in Washington, D.C., to respond to the SCE inquiry. See News Release, September 1, 2007. Counsel Brand argued that Craig's arrest and conviction was "purely personal conduct unrelated to the performance of official Senate duties," and that because his actions "were unrelated to his duties in Congress," the SCE did not have jurisdiction and therefore reviewing this matter would be unduly burdensome for the Committee. Letter from Stan Brand, Counsel to Larry Craig, to U.S. Senate Select Committee on Ethics (Sept. 5, 2007). The SCE reportedly rejected counsel's argument but suggested it would close its investigation if Craig resigned pursuant to his previous statements. See Russell, ETHICS PANEL REBUFFS CRAIG.

On February 13, 2008, the SCE issued a "Public Letter of Admonition" unanimously concluding that among other matters, Craig had violated Senate Rule 38.2, which prohibits the conversion of campaign funds to personal use. Specifically, the SCE wrote:

[T]he *Senate Ethics Manual* states that 'Members, officers, or employees may pay legal expenses incurred in connection with their official duties with funds of a Senator's principal campaign committee, *but only if such payment is approved by the Committee.*' (Emphasis added.) It appears that you have used over \$213,000 in campaign funds to pay legal (and, apparently, 'public relations') fees in connection with your appeal of your criminal conviction and in connection with the preliminary inquiry before the Committee in this matter. It appears that some portion of these

1 expenses may not be deemed to have been incurred in connection with
2 your official duties, either by the Committee or by the Federal Election
3 Commission (which has concurrent jurisdiction with the Committee on the
4 issue of conversion of a Senator's campaign funds to personal use). However,
5 without here reaching the issue of what portion of your legal expenses in this
6 matter may be payable with funds of your principal campaign committee, it is
7 clear that you never sought the Committee's approval, as required, to use
8 campaign funds for these purposes. You should also take careful note that the
9 Committee will consider any further use of your campaign funds for legal
10 expenses without the Committee's approval to be conduct demonstrating your
11 continuing disregard of ethics requirements.
12
13 *See Public Letter of Admonition, United States Senate (Feb. 13, 2008) (Select Committee*
14 *on Ethics).* The SCE's letter of public admonition states that Craig had disbursed over
15 \$213,000 on legal fees to overturn his state criminal conviction. According to Craig for
16 U.S. Senate disclosure reports, however, by the date of Craig's admonishment,
17 February 13, 2008, Craig had disbursed over \$300,000 in campaign funds for legal fees
18 to the Sutherland and Kelly firms. Eight months later Craig disbursed an additional
19 \$55,000 to Kelley & Jacobson for legal fees.¹

20 3. Legal and public relations fees

21 Craig for U.S. Senate ("the Committee"), is the principal campaign committee for
22 Larry Craig. The Committee's itemized disclosure reports reflect that from July 9, 2007,
23 through October 5, 2008, the Committee disbursed in excess of \$480,000 for legal and
24 media relations fees as follows.

¹ The Commission has not located any publicly available information on the subject of whether Craig obtained the approval of the SCE prior to this disbursement.

DATE	PAYEE	AMOUNT	PURPOSE
7/09/2007	Sutherland, Asbill & Brennan	\$37,350.50	P. R. Legal Fees
9/09/2007	Brand Law Group PC	\$22,951.80	Legal Consultant
10/29/2007	Sutherland, Asbill & Brennan	\$7,373.00	Legal Fees
10/29/2007	Brand Law Group PC	\$23,384.77	Legal Fees
10/29/2007	Sutherland, Asbill & Brennan	\$74,075.84	Legal Fees
11/11/2007	Brand Law Group PC	\$30,224.70	Legal Fees
12/05/2007	Kelly & Jacobson	\$22,032.87	Legal Fees
12/17/2007	Sutherland, Asbill & Brennan	\$17,647.08	Legal Fees
1/21/2008	Brand Law Group PC	\$24,453.83	Legal Fees
1/21/2008	Sutherland, Asbill & Brennan	\$67,468.78	Legal Fees
2/03/2008	Sutherland, Asbill & Brennan	\$80,695.37	Legal Fees
10/05/2008	Kelly & Jacobson	\$55,000.00	Legal Fees
10/05/2008	Impact Strategies	\$20,000.00	Public relations consult
	Total Amount	\$482,658.54	

The law firms reportedly retained to overturn Craig's conviction, Sutherland, Asbill & Brennan and Kelly & Jacobson, received \$361,643.44, and the Brand Law Group, retained to address the SCE inquiry, received \$101,015.10. Finally, the Committee made a \$20,000 disbursement to Impact Strategies, the crisis management firm, on October 5, 2008, reportedly for public relations services related to the Minnesota conviction.

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended, ("the Act") provides that contributions accepted by a candidate may be used by the candidate for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office. 2 U.S.C. § 439a(a)(2). Such campaign funds, however, shall not be converted to "personal use" by any person. 2 U.S.C. § 439a(b)(1). "Personal use" is defined as the use of campaign funds of a present or former candidate "to fulfill any commitment, obligation or expense of a person that would exist irrespective of the

1 candidate's election or individual duties as a holder of Federal office."

2 2 U.S.C. § 439a(b)(2). The Act itemizes certain uses of campaign funds that will be
3 considered *per se* personal use, such as home mortgage, rent or utility payments; clothing
4 purchases; vacation or other noncampaign-related trip; household food items; and tuition
5 payments. *See id.*

6 By contrast, the Commission will analyze on a case-by-case basis whether the use
7 of campaign account funds for the payment of legal expenses constitutes personal use.

8 11 C.F.R. § 113.1(g)(1)(ii)(A). Expenses which the candidate can reasonably
9 demonstrate result from campaign or officeholder duties will not be considered personal
10 use. *See* Final Rule and Explanation and Justification, Personal Use of Campaign Funds,
11 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) ("Personal Use E&J"). Legal fees and expenses,
12 however, "will not be treated as though they are campaign or officeholder related merely
13 because the underlying proceedings have some impact on the campaign or officeholder's
14 status." *Id.* at 7868. To further demonstrate this distinction, the Commission noted that
15 "legal expenses associated with a divorce or charge of driving while under the influence
16 of alcohol will be treated as personal, rather than campaign or officeholder related." *Id.*

17 There are three categories of campaign disbursements at issue: for legal fees in
18 connection with the SCE inquiry, for legal fees to overturn the misdemeanor conviction,
19 and for public relations fees. We will address each in turn.

20 1. Campaign funds used in connection with the U.S. Senate Select
21 Committee on Ethics Inquiry
22

23 The Committee's disclosure reports reflect that over \$100,000 in campaign funds
24 was disbursed to the Brand Law Group for legal fees reportedly for representation in the
25 SCE inquiry. Available information suggests that Brand's representation was limited to

1 the SCE inquiry. The Commission has previously concluded that legal fees incurred to
2 respond to any inquiry by the Senate Ethics Committee or the House Ethics Committee
3 are ordinary and necessary expenses directly related to an individual's duties as a Federal
4 officeholder; accordingly, the use of campaign funds for such purposes is not conversion
5 to personal use because these expenses would not exist "irrespective" of the
6 officeholder's duties. See Advisory Opinions 2008-07 (Vitter) and 2006-25 (Kolbe);
7 2 U.S.C. § 439a(a)(2) and (b)(2). Thus, to the extent that the entirety of the legal fees
8 incurred with the Brand Law Group are directly related to the SCE inquiry, Craig's
9 disbursement of \$101,015.10 to the Brand Law Group was a permissible use of campaign
10 funds.

11 2. Campaign funds used to pay legal fees to overturn the
12 misdemeanor conviction
13

14 The Committee disbursed in excess of \$350,000 in campaign funds to Sutherland,
15 Asbill & Brennan and Kelly & Jacobson, reportedly for legal fees associated with Craig's
16 efforts to overturn his Minnesota conviction.² Pursuant to the Commission's
17 Regulations, the Commission has considered on a case-by-case basis whether the use of
18 campaign funds for legal expenses constitutes personal use. See 11 C.F.R.
19 § 113.1(g)(1)(ii).

20 In a long line of Advisory Opinions, the Commission has determined that legal
21 fees and expenses incurred for representation in legal proceedings regarding any
22 allegations that are not related to campaign activities or duties as a Federal officeholder

² This figure includes a July 9, 2007, disbursement to Sutherland, Asbill & Brennan in the amount of \$37,350.50 for "P.R. Legal Fees." The available information is limited as to what portion, if any, of the fees assessed were for legal counsel to respond to public relations inquiries, or legal representation seeking to overturn the state conviction.

1 would constitute an impermissible personal use of campaign funds. In Advisory Opinion
2 1996-24 (Cooley), the Commission determined that the use of campaign funds for legal
3 expenses "incurred to rectify, remedy, or present legal defense to, possible liabilities, or
4 violations of law that are unrelated to his campaign or officeholder status" would be a
5 conversion of funds for personal use. The requestor of AO 1996-24 sought the
6 Commission's approval to use campaign funds to pay legal fees and expenses to
7 investigate, research, and communicate with State and Federal agencies in connection
8 with responding to press allegations of the unlawful receipt of Veterans benefits and
9 other matters. Although the Commission concluded that it was permissible to use
10 campaign funds for legal services to refute the press allegations, the Commission
11 determined that campaign funds could not be spent to defend or respond to the underlying
12 Veterans Affairs controversy because the purpose was not campaign-related or office-
13 related, and any obligations regarding that effort would exist irrespective of officeholder
14 status and so the use of campaign funds for that purpose was impermissible. AO 1996-
15 24. In Advisory Opinion 2005-11 (Cunningham), the Commission reiterated the
16 permissible use of campaign funds to pay legal fees stemming from a grand jury
17 investigation into the candidate's fundraising activity and conduct in office because the
18 allegations were directly related to the candidate's campaign and status as a Federal
19 officeholder. However, the Commission cautioned that the use of campaign funds in
20 defense of any investigation findings that were unrelated to candidate/officeholder duties
21 would be an impermissible use. *See also* Advisory Opinion 2003-17 (Treffinger).

1 According to the Committee's disclosure reports, the Committee disbursed
2 \$361,643.44 to the Sutherland and Kelly firms for "legal fees." The available
3 information suggests that both firms' legal representation were limited to overturning the
4 Minnesota state conviction. The campaign funds disbursed by the Committee to the
5 Sutherland and Kelly firms to overturn the conviction are similar to "legal expenses
6 associated with a divorce or charge of driving while under the influence of alcohol,"
7 expenses that the Commission stated "will be treated as personal, rather than campaign or
8 officeholder related." See Personal Use E&J at 7868. The Commission determined that
9 such expenses would exist irrespective of the status of the individual as a candidate or
10 officeholder, and so would not be a permissible use of campaign funds even though the
11 underlying legal proceedings may affect an officeholder's status. See *id.* As such, the
12 Committee could not use campaign funds to pay the Sutherland and Kelly firms' legal
13 fees even if the arrest and conviction impacted Craig's status as a Federal officeholder.
14 *Id.* This conclusion is consistent with the Commission's advisory opinions determining
15 that any use of campaign funds to pay for legal fees that are not campaign or Federal
16 officeholder related, and would exist irrespective of officeholder status, constitute an
17 impermissible use of campaign funds for personal use and therefore violate the Act. See
18 AO 1996-24. As such, any use of campaign funds by the Committee to pay for
19 obligations or expenses Craig incurred to overturn the conviction would be a conversion
20 of campaign funds to personal use. Thus, to the extent that the entirety of the campaign
21 funds disbursed to the law firms Sutherland, Asbill & Brennen and Kelly & Jacobson
22 were used to pay legal fees to overturn the Minnesota state conviction, they constitute

impermissible use and were converted to personal use in violation of

2 U.S.C. § 439a(b)(1).

3. Campaign funds used to pay public relations fees

The Committee also disclosed paying \$20,000 to Impact Strategies for public relations services. Impact Strategies is a corporate communications firm specializing in strategic and crisis communication services. See <http://www.impactstrategiesllc.com/>. Impact Strategies was reportedly retained to address press inquiries regarding Craig's state conviction and the legal efforts to overturn this conviction. See *Craig Hires Attorneys, Well-Known Crisis Manager*, IdahoStatesman.com, September 1, 2007, available at <http://www.idahostatesman.com/larrycraig/v-print/story/147883.html>; see also News Release, September 1, 2007. The available information does not suggest that Impact Strategies was retained to provide legal services to the Committee.

The Commission has determined that authorized committees may use campaign funds to pay legal fees and expenses incurred to prepare substantive responses to the press including preparing press releases, monitoring media allegations, and responding to media requests for comments, in view of the fact that the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media because of their status as candidates and officeholders. See Advisory Opinion 1998-01 (Hilliard). Here, the Committee paid Impact Strategies for public relations consulting. Although the Commission has not opined directly on the use of campaign funds for the payment of fees for public relations specialists (as opposed to attorneys playing a public relations role) to provide substantive responses to press inquiries, this expense is analogous to the permissible use of campaign funds for legal fees and expenses for this purpose. Thus, it

1 appears that the costs of Impact Strategies' public relations consulting may be paid with
2 campaign funds.

3 **C. Conclusion**

4 Based on the foregoing, the Commission finds reason to believe that Craig for
5 U.S. Senate and Kay O'Riordan, in her official capacity as treasurer, violated
6 2 U.S.C. § 439a(b) by converting campaign funds to personal use.

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